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Supreme Court, U.S.
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No. 09- 09-56

IN THE

Supreme Court of the United States

DIANE MARSHALL,

Petitioner,

v.

BRANDYWINE CHESAPEAKE HOUSING CORP.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

WHETHER THE DISTRICT OF COLUMBIA COURT OF APPEALS ABUSED ITS DISCRETION WHEN IT DENIED THE MOTION TO RECALL THE MANDATE ISSUED ON NOVEMBER 4, 2008.

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OPINIONS BELOW

The District of Columbia Court of Appeals opinion is not reported in any local or Regional reporter. It is attached hereto as Appendix A. On April 15, 2009, the District of Columbia Court of Appeals denied Petitioner's Motion to Recall the Mandate, of November 4, 2008, affirming the respondent's motion for summary affirmance citing: *Snowden v. Benning Heights*, 557 A.2d 151 (D.C. 1989); and *Oliver T. Carr Mgm't Inc. v. Nat'l Deli, Inc.*, 397 A.2d 914, 915 (D.C. 1979).

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on April 15, 2009. It is a final order from the highest court in the District of Columbia.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The due process clause of the Fifth Amendment's to the United States Constitution guarantees a person will not be deprived of property without due process of law.

STATEMENT OF THE CASE

Petitioner was a resident stockholder in the Brandywine-Chesapeake Housing Corporation, Respondent, a non-profit housing cooperative organized in the State of Delaware. It is authorized to do business as a housing cooperative in the District of Columbia. Its board of directors conducts its day to day affairs.

Petitioner was a stockholder/owner in Respondent's property. Respondent assesses a monthly maintenance assessment fee to maintain its property. The assessments are supposed to be established by Respondent's board of directors based on the annual cost of operating the cooperative, with stockholder's approval. Petitioner argues stockholder approval was not obtained. Each shareholder is obligated to pay their assessed share of the costs of operating the cooperative in 12 monthly installments; provided it is done with Stockholder's approval. Petitioner alleges it was not done with Stockholder's approval.

In March of 2006 the Respondent filed a complaint for possession of Petitioner's unit in the Landlord and Tenant Branch, alleging its board adopted a resolution terminating Appellant's ownership in Respondent's cooperative because of her failure to pay her monthly maintenance assessments. The case was tried before the Honorable Judge Melvin Wright. The Petitioner proceeded pro se. She argued Respondent breached their contract stating: 1). Respondent failed to maintain her cooperative apartment unit, 2). That the ceiling in her unit leaked, 3). That Respondent failed to repair it after proper notice of the leak was conveyed to them, 4) That the water damage rendered her apartment inhabitable, 5) That the D.C. Fire Department turned off all of the ten (10) electrical sockets, in her apartment, except the one to her refrigerator, for three (3) years, 6) that she had to rely on auxiliary electrical sockets (a series of drop cords to supply electricity to all of the appliances in her apartment, the cords ran across the floor in each of the rooms in her apartment), 7). That the Petitioner continued to pay her monthly assessment,

from October 2003 to November of 2004, but was unable to live in it during that time, even though she gave the Respondent notice of the deficiencies that rendered her unit uninhabitable, and 8) That Brandywine had no authority to bring a case, against her, in the Landlord and Tenant Branch of Superior Court, for her failure to pay assessments, because she is an owner and not a tenant.

The trial lasted two days. Judge Wright found for the Respondent and awarded them a judgment of possession for Petitioner's unit. Petitioner appealed Judge Wright's findings. The District of Columbia Court of Appeals affirmed Judge Wright's ruling.

REASONS FOR GRANTING THE PETITION

The due process clause of the Fifth Amendment to the United States Constitution guarantees that a person will not be deprived of their property without due process of law.

The Petitioner alleges that the respondent lacked authority to evict her because it lacked the required quorum to conduct business when it voted to evict her.

Petitioner alleges, that after the Respondent's invalid vote, the Respondent filed a complaint in the District of Columbia's Landlord and Tenant Branch, seeking her eviction. The Petitioner argued the Landlord and Tenant Court lacked jurisdiction because there was no landlord and tenant relationship and that the vote to evict was made in the absence of the required quorum to conduct business. The Landlord and Tenant Court granted the Respondent's motion for judgment and the Petitioner was evicted.

Petitioner moved to recall the mandate issued on November 4, 2008, because it violated the Petitioner's constitutional rights to confrontation and the D.C. Landlord and Tenant Branch lacked the authority to enter a judgment against her. The Motion to Recall the Mandate was denied on April 15, 2009.

The District of Columbia Court of Appeals affirmed citing ***Snowden v. Benning***; and ***Oliver T. Carr v. Nat'l*** supra. This writ should be granted to resolve the issue of whether a corporation can do business in the absence of its required quorum and whether a court, based on an invalid vote, has jurisdiction to hear that case.

SUPREME COURT PRECEDENT

There are no Supreme Court Precedents on point.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DENYING MOTION TO RECALL MANDATE FILED APRIL 15, 2009

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 07-CV-962, 08-CV-185 & 08-CV-186

DIANE MARSHALL,

Appellant,

v.

BRANDYWINE CHESAPEAKE HOUSING CORP.

Appellee.

LTB42653-06
CAB760-06
CAR4350-07

BEFORE: Blackburne-Rigsby, Associate Judge, and Farrell and Pryor, Senior Judges.

ORDER

On further consideration of this court's issuance of the mandate on November 26, 2008, appellant's motion to recall mandate, and appellee's motion for leave to late file the lodged opposition thereto, it is

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ORDERED that appellee's motion for leave to late file the lodged opposition is hereby granted and the Clerk will file the opposition. It is

FURTHER ORDERED that appellant's motion to recall mandate is denied. *See Watson v. United States*, 536 A.2d 1056, 1060 (D.C.1987).

PER CURIAM

APPENDIX B — JUDGMENT OF THE DISTRICT OF COLUMBIA COURT OF APPEALS FILED NOVEMBER 4, 2008

DISTRICT OF COLUMBIA
COURT OF APPEALS

Nos. 07-CV-962, 08-CV-185, & 08-CV-186

DIANE MARSHALL,

Appellant,

v.

BRANDYWINE CHESAPEAKE HOUSING CORP.

Appellee.

BEFORE: Fisher and Blackburne-Rigsby, Associate Judges, and Pryor Senior Judge.

JUDGMENT

On consideration of appellee's motion for summary affirmance and supporting memorandum, appellant's brief and appendix, and the record on appeal, it is

ORDERED that the motion for summary affirmance is granted. *Snowden v. Benning Heights*, 557 A.2d 151 (D.C. 1989); *Oliver T. Carr Mgm't, Inc. v. Nat'l Deli, Inc.*, 397 A.2d 914, 915 (D.C. 1979). It is

FURTHER ORDERED that appellee's request for costs is held in abeyance and appellee is directed to file an itemization with this court in 20 days. D.C. App. R. 39. It is

FURTHER ORDERED that appellee's request for fees is denied without prejudice to appellee submitting the request to the trial court. *District of Columbia Metropolitan Police Dept. v. Stanley*, 951 A.2d 65, 68 (D.C. 2008). It is

FURTHER ORDERED and ADJUDGED that the judgments on appeal be and hereby are affirmed.

ENTERED BY THE DIRECTION OF THE COURT:

s/ Garland Pinkston, Jr.
GARLAND PINKSTON, JR.
Clerk of the Court

APPENDIX C — ORDER OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION GRANTING SUMMARY JUDGMENT DATED JANUARY 7, 2008

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Case No. 2007 CA 004350 R(RP)
Calendar 12
Judge Robert E. Morin

DIANE MARSHALL,

Plaintiff

v.

BRANDYWINE CHESAPEAKE HOUSING CORPORATION

Defendant

ORDER GRANTING SUMMARY JUDGMENT

This comes before the Court on Defendant Brandywine Chesapeake Housing Corporation's ("Brandywine") Motion For Summary Judgment and Plaintiff Diane Marshall's Opposition thereto.

Brandywine is a Delaware Corporation authorized to transact business in the District of Columbia. Brandywine is a real estate cooperative governed by

certain By-laws, and Certificate of Incorporation. (See Def.'s Mot. for Summ.Exs. A (aff. of Dorothy Lane), I and B.)

Ms. Marshall was a shareholder of Brandywine and as such was the Lessee of Apartment No. 47C (the Apartment) located within Brandywine. She had an interest in the Apartment by virtue of a Propriety lease (See id, Ex. A. § 3, Ex. 2).

Article II of the Proprietary Lease states:

> In the event the Lessees default for a period of 30 days in the payment of any of the monthly maintenance assessments made by the Board of Directors or default in the payment of any of the mortgage payments, or in the case of default in the performance of any of the covenants and/or observance of any of the conditions or provisions of this lease and the estate or interest hereby created, this lease shall, at the option of the Lessor cease and terminate and Lessees will immediately surrender the demised premises in good order to the Lessor, the Lessees hereby waiving the 30-day notice by law and all other notice and agreeing to forth-with vacate said demised premises.

The evidence is undisputed that Ms. Marshall has failed to pay her monthly assessments to Brandywine since December 2004. (See id., Ex. 4.) As a result of her

failure to pay the monthly assessments, Brandywine terminated Ms. Marshall's Proprietary Lease on May 16, 2006. (Id.) Thereafter, Brandywine instituted an eviction action against Ms. Marshall in the Landlord Tenant Branch in case 2006 LTB 042653. The matter was tried before the court (Judge Wright presiding). On July 26, 2007 the Court granted Brandywine possession of the Apartment in dispute. Or) August 6, 2007, U.S. Marshals served a writ of execution. Thus, Ms. Marshall's interest in and possession of the Apartment has been terminated and she is no longer a shareholder in the cooperative.[1] (Def.'s Mot. for Summ. J., Ex. A 116, Ex. B.)

Discussion:

To prevail on a motion for summary judgment, the moving party must demonstrate, based upon the pleadings, discovery, and any affidavits or other materials submitted, that there is no genuine issue as to any material fact in dispute and that the movant is therefore entitled to judgment as a matter of law. *Grant v. May Dep't Stores Co.*, 786 A.2d 580, 583 (D.C. 2001); Super, Ct. Civ. R- 56(c). A trial court considering a defendant's motion for summary judgment must view the pleadings, discovery materials and affidavits or other

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1. Although Ms. Marshall filed an appeal and motion to stay the judgment of possession in favor of Brandywine, the Court denied the motion for stay of the judgment. Thereafter, she filed an emergency motion to stay the judgment with the Court of Appeals, which also denied her request to stay: (See Def.'s Mot. For Summ. J., Ex. C.).

materials in the light most favorable to the plaintiff and may grant the motion only if a reasonable jury could not find for the plaintiff as a matter of law. *Grant*, 786 A.2d at 583 (citing Nader v. De Toledano, 408 A.2d 31, 42 (D.C. 1979)); *Bailey v. District of Columbia*, 668 A.2d 817, 819 (D.C. 1995). The moving party has the initial burden of proving that there is no genuine issue of material fact in dispute. If the moving party carries its initial burden, then the non-moving party assumes the burden of establishing that there is a genuine issue of material fact in dispute. Grant, 786 A.2d at 583 (citing *O'Donnell v. Associated Gen. Contractors of Am., Inc.*, 645 A.2d 1084, 1086 (D.C. 1994)). Then nonmoving party may not simply rest on conclusory allegations or denials of the movant's pleadings to establish that a genuine issue of material fact is in dispute. *Boulton v. Inst. Of Int'l Educ.*, 808 A.2d 499, 502 (D.C. 2002); Super. Ct. Civ. R. 56(e). To avoid conceding a fact, the non-moving party must come forward with a response showing that there is a genuine issue for trial. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 160 (1970). Moreover, general hearsay assertions of others cannot create a factual dispute that survives a motion for summary judgment. See, e.g., *Burleson v. Burleson*, 277 A.2d 647, 649 (D.C. 1971); *Stewart v. Ashcroft*, 352 F.3d 422, 431 (D.C. Cir. 2003); *Tsehaye v. William C. Smith & Co., Inc.*, 402 F. Supp. 2d 185, 195 (D.D.C. 2005); *Hussain v. Prindpi*, 344 F. Supp. 2d 86, 100 (D.D.C. 2004).

At bottom, Ms. Marshall challenges Brandywine's legal authority to institute her removal as cooperative shareholder and its sale of the unit that she occupied.

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The Court in the Landlord and Tenant action between the parties necessarily decided these same issues, finding that Brandywine had both the authority to remove her and possession of the unit.

Under the doctrine of *res judicata*, "[w]hen a valid final judgment has been entered on the merits, the parties or those in privity with them are barred, in a subsequent proceeding, from re-litigating the same claim that might have been raised in the first proceeding." *Scoville St. Corp. v. Dist. TLC Trust, 1996*, 856 A.2d 1071, 1076-77 (D.C. 2004). For *res judicata* to apply, the parties or their privities must be the same. Here, there is no dispute that the parties in the

Landlord and Tenant action and this case are the same. Thus, Ms. Marshall's claims are barred by res judicata because her present claim depends on whether there is a "common nucleus of operative facts," *Watergate West, Inc. v. Barclays Bank, S.A.*, 759 A.2d 169, 179 (D.C. 2000).

Even if her claim was not barred by principles of *res judicata*, there are no disputes as to material facts, and summary judgment is appropriate, Brandywine has submitted a true and correct copy of the governing documents, proprietary lease, incorporation documents and resolution authorizing Ms. Marshall's termination as a shareholder because of her failure to pay assessments. In her opposition, Ms, Marshall merely asserts that Judge Wright made the wrong decision. She also suggests that the Board of Directors of Brandywine

is doing "illegal actions, including embezzlement." None of the information is presented under oath. Moreover, she does not present any evidence to contradict the evidence that she was terminated for failure to pay assessments.[2]

In her complaint, Ms. Marshall claims Brandywine has put Apartment C8 for sale without the vote or permission of the shareholders. Even thought at one time Brandywine governing documents provided that Apartment C8 was not subject to the proprietary lease because it was owned by the Cooperative, which could rent the unit, there is nothing in the Proprietary Lease itself that prohibits Brandywine from changing the status of that unit. Rather the Bylaws specifically state that:

> The property business and affairs of the Corporation shall be managed and controlled by the Board of Directors, which shall consist of seven members, all of who must be legal stockholders.

(Def.'s Mot. for Summ, J., Ex. I, By-Laws, Article 3, Section 1.)

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2. Even the purported Proprietary lease, which she attaches to her Complaint and Opposition and which she suggests is the lease in effect, provides under the lease Covenants that her interest may terminate upon failure to pay assessments. Moreover, regardless of her suggestion that the Board of Directors inappropriately sold unit C8 by way of issuance of new shares, that action does not affect the Board's ability to impose assessments or Ms. Marshall's obligation to pay those assessments.

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At the time of her membership, Ms. Marshall agreed to be bound by these By-laws, and the Board of Directors, as the manager of the corporation's property, would be well within its rights to take any action with respect to its property without shareholder approval. Wherefore, for the reasons stated, it is this *7th day of January 2008*, hereby

ORDERED, that Defendant Brandywine Chesapeake Housing Corporation's Motion For Summary Judgment is **GRANTED**; and it is farther

ORDERED, that Plaintiff's complaint is **DISMISSED WITH PREJUDICE**

s/ Robert E. Morin
Judge Robert E. Morin
(Signed in Chambers)

APPENDIX D — TRANSCRIPT OF PROCEEDINGS OF THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA, CIVIL DIVISION DATED JULY 27, 2007

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA CIVIL DIVISION

Docket Number: 2006 LTB 42653

BRANDYWINE CHESAPEAKE HOUSING CORPORATION,

Plaintiff.

vs.

DIANE MARSHALL,

Defendant.

Thursday, July 27, 2007
Washington, D.C.

The above-entitled action came on for a hearing before the Honorable MELVIN R. WRIGHT, Associate Judge, in Courtroom Number 200, commencing at 9:38 a.m.

* * *

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[Commencing at page 91]

* * *

THE COURT: All right. The court has heard testimony and his trial over the course of two days. The Court has heard testimony from Ms. Dorothy Lane, who is the president of the board of directors. She has introduced into evidence the certificate of incorporation of Brandywine, which was incorporated under the laws of the state of Delaware, the bylaws of the corporation, which is Plaintiff's Exhibit 3, and the proprietary lease between the Plaintiff, and the defendant Marshall which is Plaintiff's Exhibit 3.

Her testimony is that the corporation has a [92] current business license. And there has been no evidence contrary to that contention. Her testimony also has been that pursuant to the proprietary lease and the bylaws in Ms. Marshall as well as all tenants are required to pay monthly assessment fees for the operation co-op. Her testimony, and this has been undisputed by Ms. Marshall, is that the defendant has failed to pay monthly assessment charges in the amount of wanted to $136.54 for the month of December of 2004 and January 2005. And in addition has failed to pay the monthly assessment $275.08 from the month of February of '05 to the present time. She is further testified that as a result and the amounts which the Court has just mention that have not been paid are not disputed by Ms. Marshall. Ms. Marshall contends that she is not required to pay because of the fact that the unit is uninhabitable. There

is also no dispute, and the Court makes this following in findings and facts of law, that there is no dispute in regards to the amount of the monthly assessments nor that the monthly assessment is to accept as to whether or not it relates to the habitability of the apartment itself. So this dispute is not regarding the amount. It is regarding the condition of the apartment. If the Court finds that apartment unit is habitable the amount would be due. If the Court finds that it is not habitable then the amount would not be due. [93] There's also no dispute as the testimony has shown that the board of directors entered into a notice of termination and that the defendant was advised of the notice of termination. The defendant contends that the actions taken by the board of directors was not appropriate because of the fact that the Cooperative had violated its provisions of the lease the proprietary lease in terms of providing her with a habitable purposes. There is no dispute that the Board terminated her membership for failing to pay the monthly assessments. And there is also no dispute that the board had authority to do so under the bylaws.

The plaintiff through Ms. Lane has contended that the defendant Ms. Marshall has violated the provisions of the bylaws of the lease. In terms of the bylaws she stays specifically article 8 of the bylaws section 5. That provision of the bylaws contends, article 8 is the section which deals with the assessments. And section 5 deals with the failure to pay assessments. The bylaws indicate as follows and I quote, "if any stockholder shall default on the payment of any regular assessments properly made by the board of directors of the corporation, or if

any special assessment made and levied as hearing before or provided, you shall continue in default there of for 60 days after the same are due, or [94] shall continue for 10 days to violate any of the reasonable rules adopted by the board. The board of directors make this some of the proceedings for possession and any other suitable action in law or in equity, which will entitle the corporation to judgment for possession."

Of course Ms. Marshall focuses on that second on that section by saying that the board of directors was not permitted to seek possession of the property because again the issue of uninhabitability, which she disputes. Additionally article 7 of the same bylaws talks about the obligations of the stockholders to pay pursuant to the proprietary lease. And the proprietary lease itself an article to which talks about the "coverage under the lessee to the lesser indicates that in the event the lessee defaults on a period of 30 days and the payment of any monthly maintenance assessment made by the board of directors or defaults and the payment of any mortgage payments with performance of any of the coverage observed the lesser, this shall at the option of the lesser cease and terminate. And the lessee will immediately surrender the premise is in good order."

There is obviously been disputed this case regarding the habitability of the apartment. And the Court has heard the testimony of Ms. Lane and Mr. Bruce. Mr. Bruce is the property manager who testified that he [95] has met with Ms. Marshall and 2006 to determine damage to the unit. Mr. Marshall excuse me Mr. Bruce

indicates that since taking over as the property manager in 2006 made an effort to determine the damage to the unit. He indicated that he met with Ms. Marshall and that in his view after years experience as a property manager he was unable to determine evidence that there was any water damage. That the only issue was peeling paint and cracks due to the multiple painting in the building that has that was built and, I'm trying to remember which year, built in 1947. He indicated peeling of the ceiling and the walls which was related to the paint and not to the water damage, or at least not what he observed.

Additionally, Mr. Nicolas Steer from who was a carpenter and electrical person testified he also inspected the candidates for water damage and observed none except for water damage near a window seal where the air-conditioning unit was. He testified that there was no other water damage near the Windows other than where the air-conditioning unit was. And that he saw no evidence stains or watermarks on the ceiling, or evidence for water damage. He indicated that he was currently doing work in the unit to scrape the paint off the walls. He additionally testified that because of the age of the building that the cracks were caused by humidity and the [96] moisture and the apartment which was causing the walls and the ceiling paint to crack. He testified that he also tested the electrical outlets and found that diffuses needed to be replaced. But that there was no evidence of rust or water to the plugs that he was able to observe.

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Obviously the testimony by the plaintiff has been disputed by the defendant. And Ms. Marshall testified that she moved into the co-op in 1987. She never had any problems with moisture in the unit until after the roof was replaced in late 2003. That since that was replaced she had problems with the roof buckling and what she perceived as evidence of water damage. She has presented to support her case photographs which he contends support her condition her contention of water damage. Those photographs are Defense Exhibits 1 through 9, excuse me, 1 through 7 are photos, I'm sorry, 1 through 6, 1 through 6 shows pictures of the bathroom, which she contends shows water damage from October of 2003. She has also provided photographs Exhibits Nos. 7, 8, and 9, which are photographs taken in December of 2003 showing the kitchen, bathroom, and the living room. She contends that these photographs are proof of the evidence of water damage caused by the failure of the Brandywine to correct for the problem.

In addition to Ms. Marshall's testimony there is [97] the testimony of a resident Ms. Nicole Nickles — I'm sorry, the last name again?

MS. MARSHALL: It's Jones-Laichena.

THE COURT: Jones-Laichena who indicated that he personally observed what she believed to be water stains as well as black soot in the outlet. She described the evidence for water damage to be consistent with the photographs that were presented by the defendant by

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Ms. Marshall's exhibits 7, 8 and 9 showing damage in December of 2003.

The Court makes the following findings as a result of the testimony. The Court finds that the units occupied by ms. Marshall was not uninhabitable. The court makes that decision for various reasons. Reason number one the burden, once the plaintiff has established, which the Court finds the plaintiff has, that assessments have not been paid, the burden of proof than the shifts to the defendant to prove the reasons why it should not have been paid for it if it is legally responsible for paying. The defendant in this case has contended that she and Estes has not been able to live in the apartment because of the water damage caused by a leaking roof, the electrical problems, and primarily those. Although she indicates there were problems with the floor, and the shut off valve, and the telephone wire, the primary defense has [98] been the water stains, the leaking from the roof, the electrical problems.

The law in this case it is somewhat different than the law that was mentioned in that the law that governs how the court is to treat this situation is controlled by *Snowden vs. Benning-Heights*, which is 557, A.2d., 151. That case deals specifically with cooperatives which assets as the Court of Appeals has stated in that opinion a hybrid situation in which the housing code regulations do not apply. In a sense Ms. Marshall is an owner and is also responsible for the maintenance of the units as well as a cooperative.

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The testimony that's been presented is clear and the court finds that there is a joint responsibility between a cooperative and the stockholder, in this case Ms. Marshall, to make repairs of the unit as they occur. The testimony has been at the court accepts as true that the corporate has made numerous attempts to try and fix the apartments but has been unable to determine that the water leak which this Marshall complaint exist. There has been contradictory evidence presented during trial and the Court finds in terms of who has proven their case by a preponderance of the evidence base on the credibility of the witnesses the Court finds the plaintiff has prevailed on this issue. The Court finds does not find that there [99] was water damage in the apartment significant enough to render the apartment and habitable. Additionally, the court finds that had the condition existed and giving Ms. Marshall the benefit of the doubt she had an opportunity to make those repairs herself. And indeed she has testified that originally she was going to make those repairs. The corporate has presented evidence from other stockholders who indicated that they had damage to their units, that they made repairs on their own, and that the corporate to reimburse them for the amounts of damage that was incurred by the water damage. Ms. Marshall could have availed herself of the same pain. She chose not to do so. And instead she contended that it was the responsibility Brandywine to make the repairs. Even if that's true the court finds that Ms. Marshall did not make herself available for those repairs to be me. The Court is well aware of the fact that Ms. Marshall was not living on the premises. And even

though she testified that she comes on average twice a week to the unit the Court finds that she did not make herself available or provide efforts to prevent Brandywine to make the repairs that she claims were needed. She has testified that she has refused to give them a key. And to that for her own reasons she decided it was not necessary for them to have a key. Having made that decision it is that our responsibility to [100] provide access to the apartment. This Court finds that Ms. Marshall has failed to provide access and any complaints she has regarding the failure to make repairs are from her own lack of diligence in terms of making the repairs. Additionally this Court has mentioned she could've made the repairs on her own. And although she indicated she was waiting for the co-op to make the repairs the Court finds that the primary reason she did not make the repairs is her admission that she in essence did not have the money. It's bad because she has been unemployed since 2003. The Court finds that it is a fact based upon her testimony had, even assuming that she didn't have the money as the Court has mentioned she has failed to make her unit available for the repairs to be me. In fact the Court had to enter an order for Ms. Marshall to make the apartment available even prior to the trial, this testimony at trial, And it's the Court's view regarding the defendant's failure to make it available. The Court does not believe that a stream of water existed as a result of water damage. In fact the defendant indicated that the streams of water has stopped long ago and that there was only damage. The defendant has not presented any testimony from any repair person, fire person, expert. All we have is her own self-serving

testimony regarding what she believes to be the condition. [100] There is no independent evidence to support her position. AS a result the Court finds that the defendant has breached the contract, that the board of directors have properly terminated when the bishops as a stockholder in the corporation, and therefore the Court rewards of judgment for possession to Brandywine. Does anyone wish clarification of the Court's ruling?

MS. DUDLEY: No, Your Honor, Thank you, Your Honor.

THE COURT: In regards to the other pending matter, which I looked at this morning, Ms. Marshall's also, I believe many of those issues have been determined by this trial. And that there may be res adjudicata issues that would the Court consider what if any claims in Ms. Marshall's own lawsuit remain. I'm going to permit you to file a motion for summary judgment on the '06 case. The court can determine whether any claims by the plaintiff survives as a result of the Court's ruling in this case.

MS. DUDLEY: Thank you, Your Honor,

THE COURT: So I'm going to set this for a status hearing. When would you be able to, I would imagine you need to file, get a copy of the transcript of the Court's ruling?

MS. DUDLEY: The Court —

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[102] THE COURT: You obviously don't have to.

MS. DUDLEY: Yes, yes.

THE COURT: That usually takes about 30 days. What I'll do is outset this for a status hearing in October. You can file the motion if you wish. If not we'll have a status hearing to determine where wish to go next. So I will set this matter for October 12th.

MS. DUDLEY: Your Honor, that is one day I am not available.

THE COURT: The 14th?

MS. DUDLEY: Let me check real quick.

THE COURT: I'm sorry. I'm sorry. The fifth. October 5,

MS. DUDLEY: Your Honor, I would have to pick the Court's indulgence. I'm getting married on the sixth. So I would not be available on the fifth or right around that time. I know it's crazy but I am.

THE COURT: The 26th?

MS. DUDLEY: Yes, Your Honor. I'm available on the 26th. Thank you.

THE COURT: Ms. Marshall are you available on the 26th?

MS. MARSHALL: Yes, I am.

THE COURT: All right. October 26 at 9:30 in the morning. And that will be not in the landlord it in a [103] case that will be in the civil action. The civil action number is 760-06. As it is a landlord and tenant matter this is a final order indicating the judgment for possession will be entered in favor of the plaintiff.

MS. DUDLEY: Thank you, Your Honor.

THE COURT: Yes.

MS. MARSHALL: How do I go about appealing?

THE COURT: You go down to the Clerk's office. They will explain to you how to file a notice of appeal. You have 30 days from today to file an appeal.

MS. MARSHALL: Okay. And in what room are we going to be in on the 26th?

THE COURT: This same room here.

MS. MARSHALL: Okay. In the meantime how does that work I have possession of the apartment for 30 days?

THE COURT: You haven't until they issue a writ of eviction.

MS. MARSHALL: Okay. Thank you.

THE COURT: The Marshal will notify you when they are coming.

MS. MARSHALL: Don't I have a right to pay off all of the money?

THE COURT: Not in this case.

MS. MARSHALL: Okay. Well —

THE COURT: I cannot advise you. You need to [104] consult counsel. It's my understanding once your membership has been terminated it and even makes the right to retain. Although the corporation has the right to consider doing that certainly. But I think it's probably best that I not advise you as to what your legal rights are. You'll have to consult with counsel. The only advice I will give you is that you have 30 days to file an appeal.

MS. MARSHALL: Okay.

THE COURT: All right. This court is adjourned.

MS. DUDLEY: Thank you.

(Thereupon the hearing was concluded.)

APPENDIX E — MOTION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS DATED MARCH 6, 2009

DISTRICT OF COLUMBIA COURT OF APPEALS

Appeal No: 07-CV-000962/LTB 42653-06
Appeal No: 08-CV-000185/CAB 760-06
Appeal No:08-CV-000186/CAR 4350-07

Diane Marshall

Appellant

v.

Brandywine Chesapeake Housing, Co.

Appellee

Motion To Recall the Mandate

Comes now Diane Marshall, Appellant, by and through undersigned counsel, and moves this Court for an order recalling the mandate, in this case, and states:

1. This Court entered an order consolidating Appellant's above referenced appeals. The Court entered an order on November 4, 2008, denying Marshall's appeal. The Appellant moves this Court for an order recalling the mandate, in the above referenced appeals, because the mandate is inconsistent with the facts and the Court incorrectly interpreted the law,

resulting in an incorrect decision being rendered on Marshall's appeal.

2. Appellant was a resident stockholder in the Brandywine-Chesapeake Housing Corporation, Appellee, a non-profit housing cooperative organized in the State of Delaware. It is authorized to do business as a housing: cooperative in the District of Columbia. Its board of directors conducts its day to day affairs.

3. Appellant was a stockholder/owner in Appellee's property. Appellee assesses a monthly maintenance assessment fee to maintain its property. The assessments are supposed to be established by Appellee's board of directors based on the annual cost of operating the cooperative. Each shareholder is obligated to pay their assessed share of the costs of operating the cooperative in 12 monthly installments.

4. In March of 2006 the Appellee filed a complaint for possession of Appellant's unit in the Landlord and Tenant Branch, alleging its board adopted a resolution terminating Appellant's ownership in Appellee's cooperative because of her failure to pay her monthly maintenance assessments. The case was tried before the Honorable Judge Melvin Wright. The Appellant defended arguing: 1). Appellee failed to maintain her cooperative apartment unit, 2). That the ceiling in her unit leaked, 3). That Appellee failed to repair it after proper notice of the leak was conveyed to them, and; 4) That the water damage rendered her apartment inhabitable, and; 5). That Brandywine had no authority

to bring a case in the Landlord and Tenant Branch of Superior Court for her failure to pay assessments because she is not a tenant.

5. The trial lasted two days. Judge Wright found for the Appellant and awarded them a judgment of possession for Appellant's unit. Appellant appealed Judge Wright's findings.

6. The Landlord and Tenant Court can only exercise jurisdiction when a valid landlord and tenant relationship exist. In this case, Appellant was an owner and the Landlord and Tenant Court lacked jurisdiction to hear Appellee's case.

7. The Landlord and Tenant Court also lacked jurisdiction to hear Appellee's case, for another reason, because when the Appellee's board of directors filed suit, they lacked standing to be bring it and the subsequent orders issued by Judge Wright are *void ab initio.*

8. The correction of a wrong decision, when made within the scope of the court's authority is by an appeal or other form of direct review, but a wrong, or even a correct decision, where the court has exceeded its jurisdiction and power, is void and it may be set aside either directly or collaterally.

9. The Appellee filed a complaint for possession of Appellant's unit, in the Landlord and Tenant Branch, allegedly after its board adopted a resolution

terminating Appellant's ownership in the Appellee's building alleging her failure to pay her monthly maintenance assessments. The trial lasted two days. It was tried before the Honorable Judge Melvin Wright who entered a judgment of possession for the Appellee.

10. During that trial, Appellant argued Appellee lacked the authority to terminate her proprietary ownership in the cooperative because the resolution that allegedly terminated her ownership in the cooperative was done in a meeting without the required quorum to conduct business, in violation of the Appellee's by-laws.

11. The Appellant presented evidence that the Appellee's bylaw's requires the presence of four (4) members, of its board of directors, as its quorum requirement before any business can be conducted. The Defendant did not present any evidence showing the names of the four (4) members of its board of directors who were present when its board passed the resolution finding Appellant in breach of contract and authorizing their attorneys to take legal action to evict her.

12. Marshall clearly raised this issue in the L & T trial, No: 2006-42653, on July 26, 2007, page 28, when she stated:

> ". . . .Q Now you said it wasn't done properly and that because of your allegation that some improprieties with the—
>
> A The bylaws—

Appendix E

Q Bylaws.

A — and the voting, and the quorum of the meeting.

Q Yes. And what supports that position?

A Well I have papers that at the beginning of the stockholders meeting they said one-third of the stockholders were present. But the bylaws before they got to changing them, they have been changing them over the years, which—

Q You've made that point a number of times. How do you what evidence do you have because Ms. Lane has said that the bylaws haven't changed. What evidence do you have to say that the bylaws have been changed?

A I have copies of the old bylaws that says a quorum is the majority of the stockholders.

Q And what evidence do you have to show that they didn't have a quorum at these meetings.

A I have minutes from some of those meetings where they say that we had one third of the stockholders in there—

Q And where are those minutes?

A They're in my bag over there. I have to go get them.

THE COURT: Ms. Ingram, I'm sorry.

MS.DUDLEY: I object to this line of questioning.

THE COURT: I know you do. And you have a continuing objection.

After Appellant raised the issue questioning the jurisdiction of the Landlord and Tenant Court to hear Appellee's case, the Appellee had the burden to establish the existence of quorum when its board of directors voted that Appellant violated her contract to pay monthly assessments, and voted to give its attorneys the authority to take legal action to evict her. They failed to do so.

Pointsand Authorities

The Appellant submits the following points and authorities in support of her motion to recall the mandate:

13. Court of Appeals Rule: 41 (b)(c) and (e).

14. A corporation can only act through its board of directors and that board may only act when it is properly

called and the act(s) taken are done in the presence of a quorum. When a corporation takes an act(s), in the absence of the required quorum, the act(s) taken are null and void. **See DC Code § 29.101.36.**

15. When a case is brought on behalf of a corporation, the parties bringing it must have standing in order for the Court to exercise jurisdiction over them and render an opinion against a defendant. *Kammerman v. Kammerman*, 543 A.2d 794 (D.C. 1988). When a Court enters an order, when it lacked jurisdiction, over the parties, the judgment is void and may be attached at anytime. *Id.*

16. On July 27, 2007 when Judge Wright issued his findings he had the Appellee's by-laws before him but he failed to review the sections that addressed the requirements of a quorum when the alleged resolution was passed that terminated Appellant's ownership interest in the cooperative.

17. When Judge Wright reviewed the Appellee's by-laws Article III, First (d) was in it and it reads:

> "if at any time the Lessor shall determine, upon the affirmative vote of the holders of record of at least two-thirds of that part of its capital stock which is then owned by Lessees under proprietary lease then in force, at a meeting of such stockholders duly called to take action on the subject, that because of objectionable conduct on the part of the

> Lessees or of a person dwelling in or visiting the apartment, the tenancy of the Lessees is undesirable,"

This section mandates a two-thirds vote of the shareholders before any action can be taken against Appellant. Judge Wright did not address this issue that Appellant timely raised as a defense to the Appellee's action in the Landlord and Tenant Court.

18. The Appellee failed to introduce any evidence that the required two-thirds shareholders were present when the alleged resolution was passed terminating Appellant's ownership in the cooperative. In the absence of any such evidence, Judge Wright's findings are *void ab initio* because the trial court lacked jurisdiction to hear the Appellee's complaint

19. The Appellee does not consent to this motion.

Appendix E

CONCLUSION

20. The Landlord and Tenant Court lacked jurisdiction to hear the Appellee's case and Judge Wright's findings are *void ab initio* and that case is reversed, and; therefore the orders of Judge Morin dated, January 7, 2008, dismissing the Appellant's case, with prejudice, is also reversed.

Respectfully Submitted,

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